No. 91-5118

In The

Supreme Court of the United States

October Term, 1991

DERRICK MORGAN,

Petitioner,

vs.

ILLINOIS,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Illinois

BRIEF FOR PETITIONER

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QUESTION PRESENTED FOR REVIEW

Whether the trial court's refusal to ask whether potential jurors would automatically impose a death sentence if they convicted petitioner of murder violated due process and the Sixth Amendment guarantee of an impartial jury?

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OPINIONS AND JUDGMENTS BELOW

Certiorari was granted to review the decision of the Illinois Supreme Court in *People v. Morgan*, 142 Ill.2d 410, 568 N.E.2d 755 (1991), reprinted at pages 125-185 of the Joint Appendix. The order of the Illinois Supreme Court denying rehearing is reprinted at page 186 of the Joint Appendix.

JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . .

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The defendant was charged with murder and armed violence. (R. 1526-1533) The armed violence charge was later dismissed by the state. (R. 173) A jury convicted the defendant of murder and the same jury sentenced him to death. (R. 1216, 1477)

The trial court, rather than the attorneys, conducted *voir dire*. The state requested the court to "*Witherspoon*" the jury. (J.A. 2) The petitioner filed a motion opposing that request. (J.A. 2-8) That motion was denied. (R. 73) Before questioning the potential jurors individually, the court asked each of the three panels of potential jurors whether they could not impose a death sentence "regardless of the facts." (J.A. 9, 78, 90) Seventeen potential jurors were excused when they expressed varying degrees of doubt about their ability to impose death. (J.A. 10-22, 79-83, 90-94)

When first asked by the Court to exercise its peremptory chailenges, the defense requested that the court ask the potential jurors this question: "If you found Derrick Morgan guilty, would you automatically vote to impose the death penalty no matter what the facts are?" (J.A. 44) The court denied the request. (J.A. 44-45)

After the court questioned the panels of potential jurors, many of the potential jurors individually were asked whether they would automatically vote against the death penalty no matter what the facts were. Stuart Ship, who served as a juror, responded, "I would not vote against it." (J.A. 97-98) Petitioner was subsequently convicted of murder and sentenced to death. (J.A. 125)

On appeal, the Illinois Supreme Court affirmed the conviction and sentence. (J.A. 125-185) On this issue, that court held that there is no "reverse-*Witherspoon*" rule requiring the trial court to "life qualify" a jury. The court also rejected the claim because petitioner could not show that any of his jurors were biased towards the death penalty. (J.A. 172-173)

SUMMARY OF ARGUMENT

A jury was impaneled to try petitioner for capital murder. All potential jurors were asked whether they could not impose the death penalty under any circumstances. Those who could not were removed for cause. The trial court refused to ask potential jurors whether they would always impose death upon a convicted murderer. The jury sentenced petitioner to death.

The Illinois Supreme Court held that the trial court was not required to ask whether jurors automatically would impose death. That ruling violated petitioner's right to a fair and impartial sentencing jury, guaranteed him by the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment. *Turner v. Murray*, 476 U.S. 28, 90 L.Ed.2d 27, 36, n.9, 106 S.Ct. 1683 (1986). Neither jurors who will automatically impose the death penalty nor those who will never impose death can serve on a capital sentencing jury. *Ross v. Oklahoma*, 487 U.S. 81, 101 L.Ed.2d 80, 88, 108 S.Ct. 2273 (1989); *Adams v. Texas*, 448 U.S. 38, 65 L.Ed.2d 581, 100 S.Ct. 2521 (1980).

There exist people who believe that death automatically should be imposed following a murder conviction.

The possibility that some of those people are summoned for jury duty is sufficiently real that the Sixth and Fourteenth Amendments require that inquiry be made into individuals' beliefs that the death penalty is mandatory. An impartial jury cannot be one that is uncommonly willing to condemn a man to die. *Witherspoon v. Illinois*, 391 U.S. 510, 20 L.Ed.2d 776, 784, 88 S.Ct. 1770 (1968). Even were there few such individuals, the complete finality of the death penalty requires inquiry into this subject. *Turner v. Murray*, 476 U.S. 23, 90 L.Ed.2d 27, 106 S.Ct. 1683 (1986).

The Illinois Supreme Court also upheld the sentence because every juror had said that he could be fair. Because a belief that death automatically should be imposed reflects upon an individual's inability to follow the law, rather than upon his fairness, promises of fairness by individuals cannot substitute for asking whether they believe death automatically should be imposed. This requirement will be no great burden upon trial courts. Jurors need not be questioned out of the hearing of other jurors, nor in any greater detail than when they are now routinely questioned about their opposition to the death penalty.

The trial court's questioning allowed the state to know which jurors never would impose death and to have them removed for cause. The defendant could not know who automatically would impose death and could not challenge them. The state's advantage resulted from a *voir dire* that was so partial to the state that it violated the due process guarantee that trial procedures confer reciprocal benefits upon the state and the defendant. *Wardius v. Oregon*, 412 U.S. 470, 37 L.Ed.2d 82, 93 S.Ct. 2208 (1973).

ARGUMENT

THE TRIAL COURT'S REFUSAL TO ASK WHETHER POTENTIAL JURORS WOULD AUTOMATICALLY IMPOSE A DEATH SENTENCE IF THEY CONVICTED PETITIONER OF MURDER VIOLATED DUE PROCESS AND THE SIXTH AMENDMENT GUARANTEE OF AN IMPARTIAL JURY.

The death penalty is a very emotional subject. As a result, jurors are likely to hold very strong views on its desirability. Most of the public favors the death penalty and many of those individuals must think that death should be imposed whenever a person is convicted of murder. Yet, the trial court refused to ask potential jurors whether, "If you found Derrick Morgan guilty, would you automatically vote to impose the death penalty no matter what the facts are?" (J.A. 44)

A.

INDIVIDUALS WHO WILL AUTOMATICALLY IMPOSE A DEATH SENTENCE UPON A CONVICTED MURDERER ARE PROHIBITED FROM SITTING ON CAPITAL SENTENCING JURIES.

This Court has recognized that jurors who would automatically impose the death penalty upon a convicted murderer should not serve on a sentencing jury. *Stroud v. United States*, 251 U.S. 15, 64 L.Ed. 103, 111 (1919); *Ross v. Oklahoma*, 487 U.S. 81, 101 L.Ed.2d 80, 88, 108 S.Ct. 2273 (1988). Many other jurisdictions have reached the same conclusion.[1]

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[1] *Bracewell v. State*, 506 So.2d 354 (Ala.Cr.App. 1986); *Pickens v. State*, 292 Ark. 362, 730 S.W.2d 230 (1987); *People v.*

(Continued on following page)

Such individuals should be excluded from sentencing juries. An individual with views of the death penalty that would prevent or substantially impair the performance of his duties as a juror may not be a member of a sentencing jury. *Wainwright v. Witt*, 469 U.S. 412, 424, 83 L.Ed.2d 841, 105 S.Ct. 844 (1985). A juror is biased if he or she cannot put aside his or her prior impression concerning an issue and reach a verdict based on the evidence presented in court. *Irvin v. Dowd*, 366 U.S. 717, 6 L.Ed.2d 751, 755, 81 S.Ct. 1639 (1961). A juror who would automatically impose death upon a convicted murderer has such a view. *Ross v. Oklahoma*, 101 L.Ed.2d at 88; *People v. Coleman*, 759 P.2d at 1270. The Illinois Supreme Court once recognized as much, albeit in *dicta*. *People v. Hobbs*, 35 Ill.2d 263, 220 N.E.2d 469, 473-474 (1966). A jury that

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Coleman, 46 Cal.3d 749, 759 P.2d 230 (1987); *Sims v. United States*, 405 F.2d 1381 (D.C. Cir. 1968); *Poole v. State*, 194 So.2d 903 (Fla. 1967); *Skipper v. State*, 257 Ga. 802, 364 S.E.2d 835 (1988); *Stanford v. Commonwealth*, 734 S.W.2d 781 (Ky. 1987); *State v. Henry*, 196 La. 217, 198 So. 910 (1940); *Hunt v. State*, 321 Md. 387, 583 A.2d 218 (1990); *State v. McMillen*, 783 S.W.2d 82 (Mo. banc 1990); *Thompson v. State*, 721 P.2d 1290 (Nev. 1986); *State v. Williams*, 113 N.J. 393, 550 A.2d 1172 (1988); *State v. Rogers*, 341 S.E.2d 713 (N.C. 1986); *State v. Lawrence*, 44 Ohio St. 3d 24, 541 N.E.2d 451 (Ohio 1985); *Ross v. State*, 717 P.2d 117 (Okl.Cr. 1986); *State v. Wagner*, 305 Or. 115, 752 P.2d 1136 (1988); *Commonwealth v. White*, 531 A.2d 806 (Pa. Super. 1987); *Cumbo v. State*, 670 S.W.2d 251 (Tex.Crim.App. 1988); *State v. Norton*, 675 P.2d 577 (Ut. 1983); *Patterson v. Commonwealth*, 283 S.E.2d 212 (Va. 1981); *State v. Hughes*, 106 Wash.2d 176, 721 P.2d 902 (1986); *U.S. v. Puff*, 211 F.2d 171 (2d Cir. 1954); *Crawford v. Bounds*, 395 F.2d 297 (4th Cir. 1968).

contains individuals who believe that death should automatically follow a murder conviction is not impartial, but is a jury "uncommonly willing to condemn a man to die." *See, Witherspoon v. Illinois*, 391 U.S. 510, 20 L.Ed.2d 776, 784, 88 S.Ct. 1770 (1968).

B.

THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND THE SIXTH AMENDMENT GUARANTEE A CAPITAL DEFENDANT THE RIGHT TO ASK POTENTIAL JURORS WHETHER THEY WILL AUTOMATICALLY IMPOSE DEATH IF THE DEFENDANT IS CONVICTED OF MURDER.

The right to an impartial sentencing jury in a capital case is guaranteed by both the Sixth Amendment, made applicable to the states through the Fourteenth Amendment, and by principles of due process. *Turner v. Murray*, 476 U.S. 28, 90 L.Ed.2d 27, 36, n.9, 106 S.Ct. 1683 (1986). A specific subject must be covered by *voir dire* questioning if the failure to do so would render a defendant's trial fundamentally unfair. *Mu'Min v. Virginia*, 500 U.S. ___, 114 L.Ed.2d 493, 506, 111 S.Ct. ___ (1991). The question is whether absent the questioning, the jurors would not be "indifferent as [they stand] unsworne." *Ristaino v. Ross*, 424 U.S. 589, 47 L.Ed.2d 258, 264, 96 S.Ct. 1017 (1976). This Court has not held that the Constitution requires *voir dire* questioning to cover any subject other than racial bias, and racial bias must be inquired into only in certain circumstances. *Ristaino v. Ross*, 47 L.Ed.2d at 264. This Court should now require state trial courts, upon request by the defendant, to ask each venireperson whether he or she would automatically impose death upon a convicted

murderer. The defendant's and the government's interests in obtaining an impartial jury to conduct the highly subjective task of capital sentencing require as much.

The only reliable way to discovery whether a venireperson will automatically impose death is to specifically ask that question during *voir dire*. General fairness questions cannot suffice. A juror who believes that death should automatically be imposed believes that he is being fair in imposing it. Fairness questions are inadequate simply because the issue is not one of fairness, but the ability of an individual to follow the law.

Nor can a juror's promise to follow the law serve as a substitute for this inquiry. To impose death in Illinois, a jury must find only that the mitigating evidence does not preclude the death penalty. (J.A. 123) An individual who will always impose the death penalty will never find enough mitigation to preclude imposing death. State law will have been complied with, but the constitutional requirement of an impartial jury will still have been violated.

Such questioning is especially necessary given the nature of capital sentencing. In a capital sentencing proceeding, the jury is called upon to make a highly subjective, unique, individualized judgment regarding the punishment that a particular person deserves. *Caldwell v. Mississippi*, 472 U.S. 320, 340, n.7, 86 L.Ed.2d 231, 105 S.Ct. 2633 (1985). The Eighth Amendment requires every capital sentencer to weigh relevant mitigating evidence before deciding whether to impose the death penalty. *Turner v. Murray*, 90 L.Ed.2d at 35. This Court has recognized that

the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination. *California v. Ramos*, 463 U.S. 992, 998-999, 77 L.Ed.2d 1171, 103 S.Ct. 3446 (1983). A greater degree of scrutiny should be applied to potential sentencing jurors. A juror who believes that death should automatically be imposed upon a convicted murderer cannot weigh mitigation. Excusing those individuals from jury duty will increase the reliability of jury sentencing.

This Court allows states to *Witherspoon* jurors because the state has an important interest in removing potential jurors who cannot impose death or whose opposition to the death penalty will substantially interfere with their ability to impose death. *Witherspoon v. Illinois*, 20 L.Ed.2d at 784; *Lockhart v. McCree*, 476 U.S. 162, 90 L.Ed.2d 137, 152, 106 S.Ct. 1758 (1986). The defendant's interest in a fair sentencing jury is greater than the state's because it is his life the state is seeking to forfeit. That interest is especially great where, as in Illinois, any one juror can preclude the imposition of death. Ill.Rev.Stat., 1989, Ch. 38, § 9-1(g). That is an important right granted by the state to every defendant, but one that loses meaning unless every juror is capable of precluding a death sentence. Those who would automatically impose death are not.

Seventy-six percent of United States citizens favor the death penalty. Of those who support the death penalty, one-half supported it because they believed in the concept of "a life for a life." *The Gallup Poll Monthly*, June, 1991, 40-45. Given the oft repeated Biblical injunction of an eye for an eye, it is unsurprising that a significant

number of those who favor the death penalty believe that death should automatically be imposed upon every individual convicted of murder.[2] There are so many court decisions dealing with such individuals that they must constitute a significant portion of potential jurors. Such individuals appear even in cases where their fitness to serve is not an issue. One such person was excused for cause in *Mu'Min v. Virginia*, 114 L.Ed.2d at 503. Three were excused in *Pope v. United States*, 372 F.2d 710, 724-725 (8th Cir. 1967). One such juror may have been on petitioner's jury. Stuart Ship, when asked in *voir dire* if he would automatically vote against the death penalty, replied, "I would not vote against it." (J.A. 97-98)

When this Court required inquiry into racial prejudice in *Aldridge v. United States*, 283 U.S. 308, 75 L.Ed. 1054, 51 S.Ct. 470 (1931), it did so relying heavily on a unanimous body of state court precedents holding that such inquiry should be made. *Mu'Min v. Virginia*, 114 L.Ed.2d at 506. Of jurisdictions that have considered whether jurors should be asked whether they would always impose death, almost all have answered affirmatively, and no cases have held that such jurors should sit on a capital sentencing jury. Many decisions have held that they should not.

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[2] A survey of jurors in Kentucky revealed that 24.1% would be excludable because they would always vote to impose the death penalty for every case in which they were sure beyond a reasonable doubt that the defendant was guilty of capital murder.

Neises, M. L. & Dillehay, R.C. (1987). Death Qualification and Conviction Proneness: *Witt* and *Witherspoon* Compared. *Behavioral Sciences & The Law*, Vol. 5, 479-494, 485.

Only two states other than Illinois which have considered the question have held that inquiry into whether a juror would automatically impose death is not necessary. *Riley v. State*, 585 A.2d 719 (Del. 1990); *State v. Hyman*, 281 S.E.2d 209 (S.C. 1981). Even in South Carolina defendants are allowed to ask jurors whether they would automatically impose death. *Gaskins v. McKellar*, 916 F.2d 941, 949 (4th Cir. 1990); *State v. Atkins*, 399 S.E.2d 760, 765 (S.C. 1990). Many jurisdictions have explicitly held that defendants eligible for the death penalty have a right to ask potential jurors whether they would automatically impose death. *Bracewell v. State*, 506 So.2d 354 (Ala.Cr.App. 1986); *Sims v. United States*, 405 F.2d 1381 (D.C. Cir. 1968); *Poole v. State*, 194 So.2d 903 (Fla. 1967); *Skipper v. State*, 257 Ga. 802, 364 S.E.2d 835 (1988); *Stanford v. Commonwealth*, 734 S.W.2d 781 (Ky. 1987); *State v. Henry*, 196 La. 217, 198 So. 910 (1940); *State v. McMillen*, 783 S.W.2d 82 (Mo. banc 1990); *State v. Williams*, 113 N.J. 393, 550 A.2d 1172 (1988); *Commonwealth v. White*, 531 A.2d 806 (Pa. Super. 1987); *State v. Norton*, 675 P.2d 577 (Ut. 1983); *Patterson v. Commonwealth*, 283 S.E.2d 212 (Va. 1981). Some states allow the defense to ask jurors even in non-capital cases whether they could impose the full range of sentences. *Sanders v. State*, 626 S.W.2d 366 (Ark. 1982); *Martin v. State*, 780 S.W.2d 497 (Tex. App. – Corpus Christi 1989); *State v. McFarland*, 332 S.E.2d 217 (W.Va. 1985). That consensus indicates that potential jurors should be asked whether they automatically would impose death.

This Court recently rejected the contention that the Sixth Amendment required inquiry into the specifics of a potential juror's knowledge of pre-trial publicity. *Mu'Min*

v. Virginia, 114 L.Ed.2d 493. The various concerns which led to the rejection of Mu'Min's claim are not present here.

Mu'Min wanted more than what this Court had required in racial bias cases. He wanted the subject of pre-trial publicity to not only be covered in *voir dire,* but wanted this Court to require precise inquiries into that subject. *Mu'Min v. Virginia,* 114 L.Ed.2d at 505, 509-510. Here, petitioner merely wants the subject of the automatic imposition of the death penalty to be covered. More detailed inquiry would be necessary only when a potential juror indicated that he or she would automatically impose death. Jurors would not have to be questioned individually because there is no risk of contaminating impartial jurors with prejudicial information. Unlike the procedure sought by Mu'Min, there will be no perceptible impact on *voir dire* practices.

There is no substitute for this inquiry. In *Mu'Min,* the state trial judge was well aware of the extent of the publicity. His knowledge allowed him to accurately assess the truthfulness of the jurors' answers to his general questions about the effect the publicity might have upon their impartiality. *Mu'Min v. Virginia,* 114 L.Ed.2d at 510-511 (O'Connor, J., concurring). Here, Judge Cieslik had no personal knowledge of the potential jurors' views on the propriety of the death penalty. There was no informed exercise of judicial discretion involved in his decisions on impartiality, and those decisions do not require the deference granted to the trial court in *Mu'Min. Mu'Min v. Virginia,* 114 L.Ed.2d at 507.

Finally, in *Mu'Min* the *voir dire* concerning publicity "was by no means perfunctory." *Mu'Min v. Virginia,* 114 L.Ed.2d at 509. Here, the inquiry into automatic imposition of the death penalty was non-existent. Requiring trial courts to make this inquiry is the only way to ensure fair sentencing juries. In Illinois, the trial court has complete control over *voir dire. People v. Gacy,* 103 Ill.2d 1, 468 N.E.2d 1171 (1984). By refusing to ask this question, the trial court precluded inquiry into this subject.

The service of one juror who would automatically impose death results in a jury that is biased and violates the Sixth and Fourteenth Amendments' guarantee of an impartial jury. An Illinois defendant cannot now discover whether a venireperson would automatically impose death unless the venireperson volunteers that information. That is a capricious substitute for direct inquiry. To guarantee a meaningful Constitutional right to an impartial jury, this Court should make explicit what has previously been implied and hold that due process and the Sixth Amendment require, at the defendant's request, inquiry into whether a juror would automatically impose death.

C.

PETITIONER WAS DENIED DUE PROCESS BY A FUNDAMENTALLY UNFAIR *VOIR DIRE* PROCEDURE IN WHICH THE TRIAL COURT AT THE STATE'S BEHEST ASKED POTENTIAL JURORS WHETHER THEY COULD NOT IMPOSE THE DEATH PENALTY AND EXCUSED FOR CAUSE THOSE WHO COULD NOT, BUT REFUSED TO ASK POTENTIAL JURORS WHETHER THEY WOULD AUTOMATICALLY IMPOSE DEATH IF THEY CONVICTED THE PETITIONER OF MURDER.

The Due Process Clause entitles a criminal defendant to more than an impartial jury. It also speaks "to the balance of forces between the accused and his accuser." *Wardius v. Oregon*, 412 U.S. 470, 37 L.Ed.2d 82, 93 S.Ct. 2208 (1973). "This Court has therefore been particularly suspicious of state trial rules which provide nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial." *Wardius v. Oregon*, 37 L.Ed.2d at 87, n. 6.

Because the trial court asked veniremembers whether they could not impose a death sentence, but refused to ask whether they always would, the *voir dire* questioning gave the state an unfair advantage in selecting the jury. The balance required by the Due Process Clause was absent in this case. Because the procedure may have resulted in the seating of jurors who could not follow the Constitution's mandate to consider mitigating evidence, the lack of reciprocity interfered with petitioner's right to be sentenced fairly.

That imbalance is entrenched in Illinois. The ruling in *Witherspoon* should have benefited criminal defendants

because it was a limitation on the state's ability to excuse jurors. *Wainwright v. Witt*, 83 L.Ed.2d at 851. But *Witherspoon* routinely has been construed by Illinois courts as conferring a special right upon the state. The peculiar view of *Witherspoon* extant in Illinois is exemplified by the Illinois Supreme Court's decision in *Daley v. Hett*, 113 Ill.2d 75, 495 N.E.2d 513 (1986).

There, several defendants chose to waive their right to a sentencing jury before trial. The trial courts accepted those waivers, leaving the jury to determine only guilt while any sentence would be decided by the court. The trial courts ruled that the state could not *Witherspoon* the jurors. The Cook County State's Attorney filed various writs in the Illinois Supreme Court seeking to compel the trial courts to death qualify the potential jurors. *Daley v. Hett*, 495 N.E.2d at 514-515.

The Illinois Supreme Court upheld the right to waive a sentencing jury prior to the start of trial. *Daley v. Hett*, 495 N.E.2d at 516. The court then considered the second issue, whether the trial courts were nonetheless required to *Witherspoon* the potential jurors. The court held:

> However, plaintiff's right under *Witherspoon* does not come into effect where, as here, the juries that consider the issue of guilt will not consider eligibility for the death penalty. Because we have determined that trial judges have the statutory authority to accept pretrial waivers of sentencing juries, plaintiff's right under *Witherspoon* is inapplicable to the instant cases.
>
> *Daley v. Hett*, 495 N.E.2d at 516-517.

The Illinois Supreme Court believes *Witherspoon* conferred a right upon the state. The decisions in *Daley v. Hett* and this case have created a rule where the state is entitled to *Witherspoon* a sentencing jury but the defense has no corresponding right to ask the reciprocal question. This procedure has "unfairly weighted the scales in a capital trial. . . . " *Payne v. Tennessee*, 501 U.S. ___, 115 L.Ed.2d 720, 733, 111 S.Ct. ___ (1991).

Whatever views Illinois courts may hold, the *voir dire* in this case was unfair, and relief has been granted under similar circumstances. In one case, a juror said that he felt it would be his duty to sentence to death a defendant found guilty of murder. No further questions were asked, and the juror was seated. *Crawford v. Bounds*, 395 F.2d at 301-302, 303-304. Another venireman, who believed the defendant to be guilty, was rehabilitated by the trial court and seated. In contrast, any venireman with scruples against the death penalty was excused without further interrogation. *Crawford v. Bounds*, 395 F.2d at 303. The court held that:

> To permit a juror whose mind is foreclosed on one side of that issue to serve, while eliminating those who think to the contrary, and to exert special effort to qualify one whose mind may be foreclosed on the issue of guilt while freely excusing those who indicate a predisposition as to punishment, were not the ways to achieve the constitutional objective. Denial of equal treatment in the manner of selection inevitably resulted in a denial of due process.
>
> *Crawford v. Bounds*, 395 F.2d at 304.

In another case, a due process challenge to the jury selection was rejected. *Pope v. United States*, 372 F.2d 710 (8th Cir. 1967). In that case, in addition to questioning jurors about their scruples against the death penalty, the court inquired whether jurors believed in "an eye for an eye and a tooth for a tooth" and whether "those who live by the sword shall perish by the sword." *Pope v. United States*, 372 F.2d at 727. As a result, ten jurors were excused for scruples against the death penalty, and three because they believed that they would automatically impose death. *Pope v. United States*, 372 F.2d at 724-725. That reciprocity was lacking in petitioner's case.

If the Sixth and Fourteenth Amendments do not require that a defendant be allowed in every case to ask potential jurors whether they will always impose death, principles of due process require such inquiry in those cases where potential jurors are questioned about their scruples against the death penalty. Any other ruling guarantees the state a nonreciprocal benefit in jury selection.

D.

PETITIONER'S DEATH SENTENCE MUST BE VACATED.

Any individual who would automatically impose a death sentence upon petitioner was not qualified to serve on his jury. The *voir dire* in this case could not reveal whether any jurors would impose a death sentence automatically. Because the inadequacy of the *voir dire* may have permitted such individuals to serve on petitioner's jury, his death sentence must be vacated.

CONCLUSION

Wherefore, petitioner prays that the judgment of the Illinois Supreme Court be reversed and the cause be remanded with directions that petitioner receive a new sentencing hearing.

Respectfully submitted,

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